

MINUTES

INSOLVENCY LAW COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA

April 1, 2005

The regularly scheduled meeting of the Insolvency Law Committee of the Business Law Section of the State Bar of California was held on April 1, 2005, at the offices of Procopio Cory Hargreaves & Savitch LLP in San Diego, California. The following members attended the meeting in person (either at Procopio's offices or at satellite sites at Reed Smith LLP in Century City, California, Wendel Rosen Black & Dean in Oakland, California or Weintraub Genshlea Chediak Sproul in Sacramento) or by telephone:

Molly Baier
Elizabeth Berke-Dreyfuss
Peter Bronson
Mike Buckley
Sharon Dutton
Robert Franklin
Barry Glaser
Eve Karasik
Michael Koch
Howard Kollitz
Malhar Pagay
Donna Parkinson

Paul Pascuzzi
Mark Porter
Maria Pum
David Shemano
Dan Schechter
William Sias
Clifford Stevens
Edward Tredinnick
Mary Jo Wiggins
Craig Wolfe

Russell Clementson (Ex Officio)
Rob Harris (ExComm Liaison)

Larry Doyle, Chief Legislative Counsel to the California Bar Association, also attended as an invited guest. The following members did not attend the meeting with advance notice: Lisa Fenning. The following members did not attend the meeting without advance notice: Sandy Lavigna (Ex-Officio).

The Chair called the meeting to order at approximately 10:00 a.m.

1. Approval of Minutes: February 25, 2005

The minutes of the February 25, 2005 meeting were approved as written.

2. Membership

The Chair first noted that the Committee had agreed in email exchanges to offer Dan Schechter a seat as a special advisor to the Committee after the conclusion of his three-year term in the fall, and Dan has accepted. In addition, at the February 25, 2005 meeting, the Committee noted submission of the application of William Sias for membership, but it was not available to the Committee before the meeting. As agreed, his application was circulated and approved in email. The ExComm subsequently approved the appointment. The Chair welcomed William Sias as a member of the Committee in the class of 2007.

The Chair then raised the need for recruitment for the class whose term begins this fall, and noted that applications were available on line at the Business Law Section website. Candidates should be encouraged to apply by May 1, 2005.

The Chair then noted that by May 1, 2005, the Committee must designate the persons to act as Chair and Vice Chair for the 2005-2006 term. For that term, Paul Pascuzzi was nominated to the position of Chair, and Mark Porter, to the position of Vice-Chair, and both were elected by acclamation. Rob Harris also reminded the Committee that new chairs will be needed for the Subcommittees, and that the Committee may have a need for additional subcommittees.

3. Schedule for May Meeting

The Committee discussed the fact that Friday, May 13th, the scheduled date for the May meeting, falls during the California Bankruptcy Forum meeting. The Committee discussed various alternatives to accommodate the meeting but opted to reschedule to May 5th and hold it entirely as a telephonic meeting to avoid conflicts. An eBlast is to be sent on Committee appointments and Paul Pascuzzi will publish the Committee's planned Friday night reception for recruitment at the CBF.

4. Education Subcommittee

Elizabeth Berke-Dreyfuss reported to the Committee on behalf of the Education Subcommittee.

A. Response to Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Liz noted the Education Subcommittee held a telephonic meeting on March 25th to discuss the anticipated enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "**2005 Act**") and possible ILC responses to it. The Committee then had an extended discussion of possible educational programs for its constituency, hoping to make the Committee one of the first to present a seminar, if the bill is enacted. The Committee discussed hosting a one-hour teleseminar as soon as possible after enactment. The Committee had previously discussed videotaping an expected presentation by UCLA Professor Kenneth Klee, but Liz reported costs of video taping were extraordinary. The Committee also discussed possibly hosting a series of live meetings later around the state on various topics raised by the 2005 Act. A member suggested that, in reality, two different constituencies were involved: the general bar (including consumer bankruptcy practitioners); and bankruptcy specialists for business bankruptcy matters. The Committee developed the following plan:

- The Committee will aim first for a one-hour teleseminar on general over view of major issues raised by the 2005 Act. Topic outlines will be due by April 8th, a rehearsal will occur somewhere in the week of April 12th to 19th, and the seminar is tentatively scheduled for April 26th, 11 – Noon. Liz will send a further scheduling email, and when the date is settled, an eBlast will be sent. The Chair indicated that the topic of a State Bar wide distribution on the seminar and the 2005 Act was discussed at the Long Range Planning Retreat at La Costa, and there was some receptivity to it in light of the importance of the 2005 Act.
- The Committee will explore sharing costs of taking the Klee program with the LA Bar or the CBF, with Liz discussing costs with Susan Orloff, and Dan Shemano checking with the Financial Institutions Committee to see if they might be willing to split costs. Paul Pascuzzi will check with the CFB on their interests.
- The Committee will also consider further putting on a series of seminars at different locations around the State on specific topics related to the 2005 Act.

B. State Bar 2005 Annual Meeting.

Liz next reported that the Committee's proposal on bankruptcy and family law has been accepted for presentation at the 2005 Annual Meeting. Written materials are due by April 15th and speakers must be disclosed by April 30th (though they are already lined up). Liz also reported that the panelists for the proposed bankruptcy taxation and the Chapter 13 programs which were not selected, are willing to resubmit them for the Winter SEI. Liz also reported that Radmila Fulton indicated Standing Committee on Legal Services (SCUDDLES) is willing to co-sponsor a program with us.

5. Legislation Subcommittee; Current Projects.

The Committee turned next to matters related to current legislative projects. The Chair noted the deadline for ALP's is June 1, 2005 to submit for ExComm approval.

A. Fairness in Bankruptcy Litigation Act of 2005 (S.B. 314) [regarding venue]

The Committee took up the draft support letter for S.B. 314 which would restrict main case venue rules to limit an entity to filing for bankruptcy only in its principal place of business (rather than permitting filing in its jurisdiction of organization) and to limit affiliate filings that differ from this rule to the place where the entity's ultimate parent filed (the "***Parent Venue Rules***"). After the February meeting, a draft letter was circulated to the Committee and finalized by email. It was then circulated to the other committees of the Section, and drew comments from David Caplan on two issues related to the Parent Venue Rules: 1) that incorporation of a definition of "control" from the Bank Holding Company Act, 12 U.S.C. Section 1841, seemed inappropriately to involve the Federal Reserve Board determination of control; and 2) that the proposal did not achieve its goal of having reorganization or liquidation occur where an enterprise was operated because significant businesses are owned by holding companies with small operations in other States. After discussion of these matters, the Committee concluded that the support letter would be revised to advocate a reworded definition of "control," dropping references to banks and the Federal Reserve Board; however though Dave's second point is accurate, the Committee saw no alternative that yielded reliably predictable results. Molly Baier and Lisa Fenning were to work on revisions and circulate them to the Committee by email for comment. The Chair undertook to give David a response to his email laying out these points.

B. Conference of Delegates proposal on Tolling of Liens

The Committee then discussed a proposal to the California Conference of Delegates from the San Diego Bar Association proposing to amend California Code of Civil Procedure Section 708.110 to toll liens arising from judgment debtor's exam orders for a period while the judgment debtor is in bankruptcy. Mike Koch will contact the sponsor and determine the motivation for the proposal and report back. The Chair was to consider other enforcement implications raised by the proposal.

C. Sherwood Partners v. Lycos, 2005 U.S. App. LEXIS 490 (9th Cir. 2005)

In the above case, a three-judge panel of the Ninth Circuit held that Section 1800 of the California Code of Civil Procedure, that permits assignees in a general assignment for the benefit of creditors to recover preferential transfers, was preempted by the Bankruptcy Code. Rehearing *en banc* has been denied and Mike Koch reports that Sulmeyer Kupetz, representing Sherwood Partners, has not yet decided whether to file a petition for certiorari in the US Supreme Court.

D. CUFTA

The Committee deferred further discussion of A.B. 248 to enact corrective provisions to California Civil Code Section 3439.01.

E. Attachment Liens

The Committee reviewed a revised draft of the ALP, again spearheaded by Dan Schechter, to amend California Code of Civil Procedure Section 697.070 to address the holding in *Southern California Plastics, Inc.*, 165 F.3d 12443 (9th Cir. 1999). The Committee had previously approved the ALP for submission to the ExComm. However, it appeared that certain corrections needed to be made to the language of the proposed statute, and Molly Baier was going to undertake them and circulate.

F. IP Perfection

Mark Porter reported speaking with some of the proponents involved in prior efforts to get Congress to resolve conflicts in federal and state law concerning the perfection of security interests in intellectual property. The sense was that attempting a resolution would pit the entertainment industry against the banks and was likely to be difficult and unproductive. Mark proposed dropping the matter from the agenda, and there was no objection.

G. ABA Attorney-Client Privilege Task Force

For informational purposes, the Chair noted Jeff Selman's March 24th email about Steve Hazen's testimony on behalf of the Corporations Committee on before the ABA Task on Attorney Client privilege. No action is required by the Committee.

H. CLRC

Mike Koch indicated that nothing appeared on the California Law Revision Commission's agenda for its May 12th meeting, which appeared to call for Committee action. CLRC made no mention of the mechanics' lien law. Mark Porter indicated that he had spoken with David Gould, who is attempting to finish a report to CLRC on Assignments for the Benefit of Creditors, and David had said that in light of the Ninth Circuit's decision in *Sherwood Partners*, his report was going to require some rewriting about preferences.

I. Recordation of Judgment Liens against Foreign Corporations

The Chair indicated that at the La Costa Long Range Planning Retreat he discussed with some members of the UCC Committee the effect that adoption of Revised Article 9 had on California Code of Civil Procedure Section 697.530. This section previously permitted creation of a judgment lien on all property of a corporation in California by filing the judgment in the UCC records of the California Secretary of State; now it appear unavailable against foreign corporations. The members of the UCC Committee with whom the Chair discussed this matter acknowledged that Section 697.530 may need adjustment and they planned to take the subject up at their next regular meeting.

J. Secret Liens

The Chair also reported that in the conversations mention in the previous paragraph, he learned the UCC Committee is moving along on a compendium of secret liens in California. The scope of the problem, however, is so large they are unsure how to proceed thereafter. Is a legislative fix possible? Is

a report with an education function alone helpful? If so, can it be published widely so that the Bar is educated?

K. Dropped Bills

S1920 (amending Chapter 12) and HR 4571 (Lawsuit Abuse Reduction Act), listed on the agenda, were from the last Congress and not enacted. They should be dropped from the agenda.

L. Draft Opinion Report and Civil Jury Instructions

Finally, the Committee concluded that it did not want to take any action with regard to the new report on opinions drafted by the Opinion Committee or comment on the proposed revisions to the Civil Jury instructions.

6. ECF Subcommittee

Liz Berke-Dreyfuss reported that she has also joined a committee of lawyers practicing in the Northern District of California and court personnel who are trying to resolve problems with the Bankruptcy Court's electronic filing system in the District. The other committee, coordinated by Linda Collins, will meet quarterly. As their initial task, this other committee is trying to gather a list of problems with e-filing. Liz gave the example that they discovered the different divisions of the Northern District were using inconsistent filing procedures for the same matters. Liz will provide a preliminary report on e-filing problems when the lawyers committee is finished compiling it.

7. Publications Subcommittee

David Shemano reported to the *Business Law News* has all articles that were expected for the current edition, and it will be published in the near future. Articles for the summer edition will be on mergers and acquisition. Rob Harris indicated that the editions are behind schedule, and we should expect the fall edition to come out in about six months.

8. Constituency/Outreach/Website Report

Bob Franklin reported to the Committee on behalf of the Constituency/Outreach/Website Subcommittee. With regard to linking from the website to materials related to the 2005 Act, most of the materials discovered so far which might serve as linked content have been too commercial.

Rob Harris reported that the ExComm is considering a new approach to materials distribution through creating a private website for each standing committee, open only to members. The point would be to eliminate section emails and provide a location for discussion threads. Rob wondered if it would soak up too much energy or time or sap resources from efforts to keep up the Committee's external website. The Franchise Committee is experimenting with a private network. Bob Franklin and Mike Buckley will contact Stafford Matthews at Morrison and Foerster about the Franchise Committee's project and report back.

Regarding eBlasts, Rob Harris noted that the number seems to be about right and that the vehicle can be used for matters of interest to the constituency other than current developments.

It was noted that about 700 emails are on the constituency list with only about one-tenth including names associated with emails. When lawyers on the list change email addresses and generate bounces, absence of related name information makes it difficult to contact them to reinstate. Paul

Pascuzzi compiled a list from the CBF website that will be circulated. The Chair noted that about 40 to 50 law professors across the country were added last week through response to 200 invitations to join that were sent by Dan Schechter.

9. Bankruptcy Law Advisory Commission

Barry Glaser reported that he had spoken with Scott Bovitz regarding the Committee's concern about the changes in the Bar's Bankruptcy Specialist Certification and need for adjustments to the certification exam. Scott expressed interest in attending the Committee's June 16th meeting in Los Angeles and is willing to listen to the Committee's recommendations regarding subject matters to be tested. Members should send issues with the test to Barry, and a formal invitation to the June 16th meeting will be made to Scott Bovitz.

10. Update from ExComm Liaison.

Rob Harris reported that ExComm has been noticing efforts of the Committee at outreach and that the 2005 Act in particular will held the Committee move into the spotlight if it presents programs and information on it.

11. Adjournment.

There being no further business, the meeting was adjourned at approximately 12:40 p.m. The Chair noted the next meeting will be held by telephone on May 5th.

Mark Porter, Secretary